

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 43 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements? Yes
 2. To be referred to the Reporter or not? Yes :
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO
3 to 5 No

DUMALA VAGHPARA GRAM PANCHAYAT

Versus

CHUNILAL TRIBHOVANDAS PATEL

Appearance:

MR MIHIR H JOSHI for Petitioner

MS MITA S PANCHAL for Respondent No. 1

NOTICE NOT RECD BACK for Respondent No. 2, 3

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 13/07/1999

ORAL JUDGEMENT

1. Chunilal Tribhovandas Patel - respondent No.1 in this Second Appeal claimed to be the owner of a piece of land situated in the village Dumal Vaghpara, taluka Jhagadia, District Bharuch, by operation of the Bombay Merged Territories & Abolition Act, 1953. The respondent

No.1 claimed that it was a dumaldar property in his possession and he has become the owner of the same. The respondent No.1 asked permission from Dumala Vaghpara Gram Panchayat to erect structure upon the land under the

Panchayat Act, which was granted to him earlier and accordingly he had erected construction upon the land. However, the said construction was demolished by the Panchayat on 25th September, 1974. Therefore, the respondent No.1 filed a Civil Suit, being Regular Civil Suit No. 194 of 1974 for the damages, which was decreed and appeal filed against the decree was dismissed. Thereafter, respondent No.1 intended to erect construction again upon the land as per the previous permission and he intimated his intention to the Panchayat and since the Panchayat did not permit the respondent No.1, he filed present suit, being Regular Civil Suit No. 49 of 1986 in the court of Civil Judge, (JD), Jhagadia for a permanent injunction restraining Dumala Vaghpara Gram Panchayat from causing any obstruction in the construction to be carried out by the respondent No.1. In that suit, the respondent No.1 was the plaintiff, Dumala Vaghpara Gram Panchayat was defendant No.1, Taluka Panchayat, Jhagadia, and one Bashirbhai Ahmedbhai being Sarpanch of the Dumala Vaghpara Gram Panchayat were defendants No. 2 and 3 respectively. Suit was tried by the trial judge and trial judge dismissed the suit. Against which, a Civil Regular Appeal was filed by the plaintiff i.e. the present respondent No.1, in the court of District Judge at Bharuch, being Regular Civil Appeal No. 51 of 1993, in which the judgment and decree of dismissal of a suit passed by the trial court was reversed by the Appellate

Court. The Second Joint District Judge, Bharuch, pronounced the decision on Appeal No. 51 of 1993 on 31st December, 1998 and hence Dumala Vaghpara Gram Panchayat has filed this Second Appeal in this Court.

2. Learned Advocate Mr. Mihir Joshi on behalf of the appellant and learned Advocate Ms. Mita S. Panchal on behalf of the respondent No.1 were heard.

3. The trial court dismissed the suit mainly on the ground that the plaintiff failed to establish the ownership on the land and since the construction work

which was intended to be carried, was without permission

as per Sec. 93 of the Gujarat Panchayats Act. The trial court framed as many as 18 issues and after recording the evidence, replied each issue.

4. While perusing the judgment of the First Appellate Court, it appears that the First Appellate Court has not taken any pain to go through the real controversy between the parties and to decide the same. The questions like the ownership of the land, permission under Sec. 93 of the Panchayat Act, the rights of the Panchayat and the Plaintiff regarding the land were the serious issues, which were tried by the trial court and which was required to be enquired into, scrutinised by the Appellate Court. Instead, First Appellate Court came to believe that there was an earlier suit, in which the

permission was granted and hence the plaintiff be permitted to construct the structure accordingly. No reasoning, whatsoever, has been assigned by the First Appellate Court for reversing the judgment and decree of the trial court. Even the First Appellate Court observed that the issue of ownership was not required to be decided in the Appeal since the Appeal could be decided without that issue.

5. Appeal is a valuable right of the parties conferred by law. There is a hierarchical arrangement made in the law to finally decide the controversy of the parties litigating so as to avoid any further litigation.

6. First Appellate Court is very important link in the hierarchial chain because the First Appellate Court is a last court of the fact finding. It is, therefore, an obligatory upon the First Appellate Court being final court of fact finding to meet with the reasonings of the trial court and to indicate its own reasons for the conclusion which it might arrive at. It is also the duty of the First Appellate Court to discuss the material evidence on record so as to decide the controversy finally between the parties on the issues of law and facts. Rule 31 O.41 of the Code of Civil Procedure, therefore, is enacted and it casts upon a duty that in the judgment, the Appellate Court must state the following facts:

- (i) the points for determination,
- (ii) the decision thereon;
- (iii) the reasons for the decision; and

- (iv) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

This provision is mandatory and imperative. The object behind the provision is two fold. Firstly, to afford the parties an opportunity of knowing and understanding the grounds of the decisions with a view to enable them to exercise the right of Second Appeal, and secondly, to enable the High Court in Second Appeal to judge whether the Lower Appellate Court has properly appreciated the case and has decided it after applying its mind to it and that whether material on record is considered in judicial manner.

7. Therefore, it is expected from the First Appellate Court that the decision of the First Appellate Court must be self-contained and complete and adequate and satisfactory. To achieve the above mentioned two objectives thorough scrutiny to appreciate the evidence on record and the reasons for the conclusions arrived at through the above mentioned judicial process are essentials and these are the salient features of the judgment as has been envisaged under R.31 O.41 of the Civil Procedure Code.

8. When the First Appellate Court reverses the findings of the trial court, then, the First Appellate Court must be more careful. Its judgment must contain the definite finding of the questions involved, the reasons for reversing the decision of the trial court must be distinctly stated; and appellate court is duty bound to express its valuable opinion on all points on which the lower court has based its conclusion. All that necessary is its judgment must clearly suggest that it has applied judicial mind to the appreciation of the evidence and manifestly conveys the judicial thinking by which it differs from the conclusion of the lower court.

9. Now as stated before, the approach of the First Appellate Court appears to be very casual and cursory in the present matter. Serious questions and issues are involved in the matter, which are required to be decided with reference to the evidence on record and the law prevailing. Instead taking into consideration only fact

of previous litigation between the parties, the lower appellate court has decided these all controversies in one paragraph only, which is quoted hereunder :

(11) In the result, the appellant/plaintiff may carry out the construction after making panchnama of the existing construction. The trial court had erred in dismissing the suit of the plaintiff. The matter is then remanded back to the trial court only for the limited purpose namely to allow the plaintiff to put up pre-existing structure/construction. On completion of such a structure/construction, the proceeding would stand terminated unless the same are kept alive by either party by reason one or the other plea.

(12) Till the plaintiff/appellant completes the pre-existing structure/construction, the respondent/defendant shall not proceed to remove or demolish such construction. The respondent/defendant may apply to the court if pending the proceeding and pending the construction by the appellant/plaintiff if it is considered necessary on account of appellant/plaintiff putting a construction contrary to or in excess of pre-existing construction. In any case, the respondent/defendant shall not proceed to remove or demolish the appellant/plaintiff's structure/construction without giving any prior written notice for the same of at least 10 days period.

10. Ultimately, the First Appellate Court passed the following order :

ORDER

" The Appeal is allowed.

The judgment and decree passed by the trial court is set aside.

The matter is remanded back to the trial court.

The panchnama of the existing structure may be made on application submitted by the appellant/plaintiff for the same, after issuing the notice to the panchayat of such application.

The applicant/plaintiff may put up the construction only upto the pre-existing position.

In any case, the Panchayat shall not take coercive steps to remove the construction without prior serving 10 days notice to the appellant / plaintiff.

Form date of the appearance of the parties is fixed on 15.2.99.

No order as to cost.

Pronounced in open court today, on this 31st day of December, 1998."

11. Instead of coming to the real controversy and to reappreciate the evidence led in the case, it appears

that the First Appellate Court did not apply its mind and the matter is decided by very casual and cursory approach, and not only that, but the remand of the matter to the trial court would be only under R.23 or 23-A O.41 of the Code of Civil Procedure. Remand to the trial court for drawing the panchnama is ex facie illegal. In fact, the judgment of the appellate court is not a judgment in the eye of law as has been envisaged under R.31 O.41 of the Code. Neither the issues of law and facts are discerned and properly decided nor the evidence is properly appreciated nor there appears any application of mind to the controversy in the matter. In Second Appeal, only substantial questions of law are to be tried and decided. Not deciding the controversy properly at First Appellate Court, an important stage, would result in loss of valuable right of the litigants because so far as the finding of fact is concerned, the First Appellate Court is the last court. Even the questions of law are required to be decided finally by the courts below and only substantial questions of law can be decided in Second Appeal. Denial of these rights to the parties, would amount to illegality. Even the absence of the counsel of Respondent would not absolve the First Appellate Court from deciding the matter as said above on

merits.

12. Therefore, the circumstances have led to only one conclusion, and that too, to remand the matter to the First Appellate court for the proper adjudication. I am conscious of the fact that the First Appellate Court may

not decide the issues which are not necessary or important for deciding the Appeal, but that is not the law that the appeal can be decided even not deciding the crucial and necessary issues. I am also conscious of the fact that under Sec. 103 of the Civil Procedure Code, in certain circumstances, Second Appellate Court can decide the issue of fact, but this is not the proper case to deal with under Sec.103 of the Civil Procedure Code. This is the case where there is no judgment at all of the First Appellate Court according to law. The Second Appellate Court, which by law, empowered only to decide the substantial questions of law, cannot be expected to decide the question of fact and law and act as First Appellate Court, and hence, inevitably the only course open is to remand the Appeal back to the First Appellate Court i.e. District Court, Bharuch, to decide the same according to the law.

13. Therefore, in the facts and circumstances of this case, the judgment of the First Appellate Court in Civil Appeal No. 51 of 1993 pronounced on 31st December, 1998, is required to be quashed and set aside and accordingly the same is quashed and set aside. Regular Civil Appeal No. 51 of 1993, therefore, is remanded back to the District Court at Bharuch. The District Court, Bharuch, is directed that after affording sufficient opportunities to the parties of hearing to decide the Appeal afresh on all points which may arise in the matter according to law. Learned counsels of parties have agreed here that by consent of both the parties that they be allowed to

produce additional evidence if necessary for final adjudication of the matter, and if such request is made by the either party, the First Appellate Court shall allow such party to lead relevant evidence, documentary or oral. The First Appellate Court shall then take all the material into consideration and shall decide the appeal afresh on the issues. The District Court is further directed to decide the Appeal within two months from the date of receipt of writ of this Court.

14. This Second Appeal No. 43 of 1999 is disposed of

accordingly with the above order. No order as to costs.
Notice is discharged. Office is directed to send back
the Record and Proceedings of the matter immediately to
the Appellate Court.

p.n.nair